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IN THE

Supreme Court of the United States

October Term 1973

No. 72-1622

ALMA F. ANDERSON, DIANA BARCLAY, BETTY JEAN B. NEILSEN and PARKER M. NIELSON,

Petitioners,

vs.

SALT LAKE CITY CORPORATION and SALT LAKE COUNTY, UTAH

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[redacted] Respondents' [redacted] BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In Support of Respondents' Position

REASONS FOR DENYING THE WRIT

ARGUMENT

I

PETITIONERS' THREE POINTS ARE LITERALLY UP-ENDED BY LEADING CASE LAW AND THE SOCIAL AND CULTURAL HISTORY OF OUR COUNTRY.

(a) In this case of *Anderson v. Salt Lake City Corporation*, 348 F. Supp. 1170, (D.C. Utah 1972), the Tenth Circuit Court, in an unanimous opinion, reversed the District Court's decision. Circuit Judge Murrah wrote a commentworthy opinion, and, with impeccable exactness, did the job of distinguishing the *Anderson* case from others offered in opposition.

Judge Murrah summarized these distinctions by adding, "It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era." (App. 45a).

No one is coerced to look upon the Ten Commandments monument, as Judge Murrah said. Perhaps, with tongue in cheek, the Judge made reference to *Cohen v. State of California*, 403 U.S. 15 (1971). ("Although they are in plain view, no one is required to read or recite them)". (App. 44a).

An appropriate similar paraphrase of this admonition in *Cohen* is found in a new Utah Law Review article, Volume 4, 1972, page 503. It is verbosely entitled, *"He that Hath Eyes to See, Let Him See; He that is offended, Let Him Look the Other Way—Obscenity Law and Artistic Expression"*. Although the *Cohen* decision found its roots in the so-called obscenity law violations, there may be a moral here, as the same admonitions, for adequate reasons, seem applicable to this secular-religious monument located on the courthouse lawn in Salt Lake City.

(b) In citing the 1947 *Everson v. Board of Education* case, 330 U.S. 1, in support of his argument for

a writ of Certiorari, petitioners overlook the fact that the 1970 *Walz v. Tax Commission of the City of New York,* 397 U.S. 664, rejected the absolutistic "no aid" dicta of the *Everson* case. It further ruled that Establishment of a religion involved "sponsorship, financial support, and active involvement of the sovereign in religious activity." The position sometimes enjoyed by the absolute secularists is up-ended by the *Walz* decision. Mr. Justice Burger stated, in substance, in his opinion there, that an essential part of adjudication, when interpreting the constitution, is the drawing of distinctions, including the fine ones. Further, that courts have long been required to determine what *acts* violate the religious cases of the First Amendment, and whether they establish or interfere with religion.

Mr. Justice Burger, in his *Walz* case opinion, cited Mr. Justice Douglas in the case of *Zorach v. Clauson,* 343 U.S. 306 (1952), who, in writing for the court noted:

"The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."

Mr. Justice Douglas continued, "We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of his adherents and the appeal of its dogma."

Mr. Justice Harlan expressed something of this in his dissent in *Sherbert v. Verner,* 374 U.S. 398 (1963), saying that the constitutional neutrality imposed on us "is not so narrow a channel that the slight-

est deviation from an absolutely straight course leads to condemnation."

To paraphrase the good book, the Letter of the Law killeth, and the Spirit of the Law Giveth Life. *New Testament,* II Corinthians, Ch. 3, Verse 6.

The urging of Petitioners to grant their Writ to prevent "emasculation of prior rulings" of this court is simply without substance or merit.

(c) As to Petitioners proposition III, one's first reaction might be, what basic difference does it make whether "purpose" and "effect" are questions of fact or law? Do the Circuits need "guidance" in this regard, as Petitioners request?

Petitioners aver that the *Anderson* case (supra) was tried with the understanding that all parties considered "purpose" and "effect" were factual matters, to be determined by the court from the evidence presented. This respondent respectfully takes exception to this claim.

The criteria of the *Abington Township School District v. Schempp case,* 374 US 203, (1963), has been regarded as a question of law in several recent cases. Among these are: *Woman v. Essex,* 342 F. Supp. 399 (1972); *Woman vs. Kosydar,* 353 F. Supp. 744 (1972); *Lemon v. Kurtzman,* 403 U.S. 603 (1971); *Allen v. Morton* (formerly *Allen v. Hickel*), 333 F. Supp. 1088 (U.S. D.C. D.C. 1971) and the *Schempp* case itself. Therefore this argument, this respondent contends, should be summarily rejected.

(d) Petitioners, in their "Statement," on page 5 of their brief, complain that the Circuit Court failed

to discuss the "meaning and effect of Rule 52 (a), *Federal Rules of Civil Procedure.*" They further contend that the district court's findings of fact should have been held to be "clearly erroneous" by the Circuit court. This respondent finds nothing to require the Circuit court to discuss Rule 52 (a), nor use the phrase, "clearly erroneous," as relate to the findings.

One of the key decisions which interpret Rule 52 (a) is the 1948 case, *United States v. United States Gypsum Co.,* 333 U.S. 364. Mr. Justice Reed, writing for the court in that case concluded with an often-quoted formulation, that "A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence is left with the definite and firm conviction that a mistake has been committed." The Circuit Court, with three judges, were unanimous in their opinion to reverse the district court decision. After reading the record, they may have believed, as this respondent did, that the district court judge closed his ears to the evidence of defendants, barely suffered through the expert testimony presented by the defendants, and then failed to accurately apply existing case law to the facts of the *Anderson* case, (supra).

The Fifth Circuit, in the case of *Western Cotton Oil Co. v. Hodges,* (CA 5th, 1954), 218 F2d 158, proposes a three-point test, which, when applied to the *Anderson* case (supra), would uphold the district court findings as "clearly erroneous." A full treatise on this respondent's position here is found in *Moore Federal Practice,* Volume 5A, pages 2613-2661, inclusive.

II

ACCOMMODATION IS THE LAW OF THE LAND

Accommodation is squarely the policy of the Supreme Court today, and is the law of the land. Accommodation means this: that there will be gracious toleration of religion and all religions; that the State may and can accommodate all with "benevolent neutrality" in ways that neither involve oppression nor deprivation of Exercise or tax, identifiably, for essentially ecclesiastical purposes, *Doremus vs. Board of Education,* 342 U.S. 429, 432-433 (1952). Said Judge Froessel of the New York Court of Appeals in *Zorach v. Clauson,* at the state level, 303 N.Y. 171, 172, 100 NE 2d at 467, the "wall"

> "is designed as a reasonable line of demarcation between friends and not an iron curtain as between foes."

The State is not to be manipulated into a position of being anti-religion, nor of pitting one irreligion against religion. *Lewis v. Allen,* 159 NYS 2d 807, 812-813 (1957); *McGowan v. Maryland,* 366 U S 420, 444-445, Readers Digest, Feb. 1965, pp 49-51. Accommodation is here to stay.[1]

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1 The catalogue of accommodations is long and impressive. See **McCollum v. Board of Education,** 333 U S 203, 238, 248, 255-256; **Zorach v. Clauson,** 343 U S 306, 312-313; **Engel v. Vitale,** 370 U S 421, 435 (footnote 21), 437 (footnote 1), 440-441 (footnote 5), 446-450 (1962); **School District of Abington Township v. Schempp,** 374 U S 203, 212-213, 394-296, 303-304, 314 (1963); Fellman, "Separation of Church and State", 1950 Wis. L. R. 427, 743-475; Oaks, **The Wall Between Church and State,** p. 21 (U. of Chicago Press, 1963); Konvitz, **Fundamental Liberties of a Free People,** Chap. 7 (Cornell U. Press, 1957).

Two other references should be mentioned here on this subject of "Accommodation."

A leading church-state authority, Professor Paul Kauper of Michigan in "The Walz Decision," 69 Mich. L. Rev. 179, 196-198 (1970), highlights the significance of the case, thus:

> (1) A long established practice has persuasive practical value as an aid in construing the Establishment clause.
>
> (2) The Court eschews absolute and rhetorical extremes and speaks of "realistic and sensible solutions."
>
> (3) Emphasis on the general purposes of the twin religion clauses, Exercise and Establishment, to promote and protect religious liberty.
>
> (4) Stresses the "benevolent neutralist" of accommodation which accords a central place to religious liberty.
>
> "*Walz* is important because it affirms the accommodation theory in a striking way, notwithstanding what has been said in intervening opinions about neutrality and secular purpose."

In the leading case of *Milwaukee County v. Carter*, 258 Wis. 139 45 N W 2d 90, 92 (1950), the Supreme Court of Wisconsin observed that a different rule applies to the use of public parks than to public school buildings:

> "However, although under Art. I, Sec. 18, Wis. Const., and the decision of this court in the Weiss case, supra, and other cases, and likewise the decision of the Unietd States Supreme Court

> in the McCollum case, supra, such use of tax-supported public school property and public school funds is prohibited, *no such restriction is considered applicable under the recent decisions of the United States Supreme Court to the use of public parks or streets by the people in their constitutional right to peaceably assemble in the free and orderly exercise of their religion and the freedom of speech, and of the press, as provided in the First Amendment to the United States Constitution.*" (Emphasis supplied.)

III

LOCAL MONUMENTS ARE LOCAL MATTERS AND SHOULD BE TREATED BY LOCAL AUTHORITIES ON A LOCAL LEVEL.

The recent Solicitor General of the United States, the Honorable Erwin N. Griswold, while Dean of the Harvard Law School, sharply criticized the absolutistic approach in his classic article, "Absolute is in the Dark," 8 Utah Law Rev 167 (1963). At page 175, he stated:

> " * * * There are some matters which should be settled on a local level in each community and should not become great Supreme Court cases. This can be presented on an essentially legal level in terms of 'standing to sue' and this has been thoughtfully developed by my colleague, Professor Sutherland."

The late Professor Sutherland, in "Establishment According to *Engel*," 76 H L Rev 25 (1962), recommended that instead of deciding such constitutional questions as the "Regent's prayer in *Engel*, supra, as one of Establishment, a judicial self-restraint should be exercised, leaving this and similar religious controver-

sies, *not involving oppression or taxation,* to be resolved by other agencies of government or by the citizens themselves. Trenchant observations in this article by Professor Sutherland, (who in his lifetime as a judge's son, a clerk to Justice Holmes, a professor, and writer, stands eminent among Church-State authorities) include:

> "To make inevitable distinctions between a time for judicial action and a time for judicial self-restraint, few sources of guidance can be as satisfactory as the disciplined prepossessions of an independent judge, aware of history, tolerant of the democratic process, and conscious of human limitations." (Page 40.)
>
> "In the absence of substantial oppression of any individual by tax or by regulation, the whole business of state establishment could have been treated as a matter of policy for state legislators, a 'political question' as to how far the wholesome principle of separate church and state, under which government refrains from running churches and churches do not meddle in government, should be pressed to a minimal conclusion in a society as complex as that of today's United States." (Page 41.)
>
> * * * self-restraint by ordinary citizens is a virtue essential to life in a democratic society —a virtue as essential to minorities as to majorities. Unless some person is substantially hurt or oppressed, the judicial systems of the states and of the United States are not often wisely besought to intervene among differing social groups, even when difference is impelled by strong emotional urges." (Page 52.)

Mr. Justice Jackson, concurring in *McCollum v. Board of Education,* 333 U S at 238, put the heart of the matter this way:

> "If with no surer legal guidance we are to take up and decide every variation of this controversy, *raised by persons not subject to penalty or tax,* but who are dissatisfied with the way schools are dealing with the problem, we are likely to have much business of the sort. And more importantly, we are likely to make the legal wall of separation between church and state as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded." (Emphasis supplied)

IV

THERE IS NO RELIGIOUS ACTIVITY UNDER THIS SECTION OF THE CONSTITUTION.

The Oklahoma Supreme Court, in *McMasters v. State,* 207 P 566, 568 (Okl. Ct. Crim App, 1922), discusses the word religion," citing *Davis v. Beason,* 133 U S 333, and states:

> "It has been held that 'religion' has reference to Divinity; to reverence, worship, obedience, and submission to the mandates and precepts of supernatural or superior beings * * * ."

Petitoners in their Petition show absolutely no well-pleaded religious activity within the words of this Court. In *Anderson v. Laird,* 316 F. Supp. 1081 (D.C. D.C., 1970), involving the attendance of Service Academy members at chapel, the Court states at 316 F Supp 1088:

> "The activities involved are not aimed at the cultivation of religious faith or motivation * * * "

Judge Corcoran further pointed out that cadets are required to attend chapel but not required to participate in the service or to worship. He said, at page 1087:

> "Nor is it revolutionary to say that First Amendment rights are not absolute. * * * Tradition—and the continuous public acceptance of a practice—carries weight and demands recognition. * * * "

Petitioners have completely failed to show that this monument is a shrine or a place of worship or utilized for the propagation of the faith of any specific religious sect. *State ex rel Singelmann v. Morrison,* 57 So. 2d 238, 246 (Ct App La., 1952); *State ex rel Johnson v. Boyd,* 217 Ind. 348, 28 N.E. 2d 256, 265 (1940).

V

MERE DISAGREEMENT IN CONSCIENCE IS NOT A CONSTITUTIONAL INJURY.

Petitioners cannot press down a crown of thorns on every monument to serve their personal thoughts and feelings. In a nation of multiplicity of religious sect, we cannot give every citizen's conscience a right of veto as *he* sees fit. Petitioners are free to hold their convictions of conscience, but they have no right, merely because they are conscientious, to impose them as the law of the land. Mere disagreement in conscience is not a constitutional injury. The Oklahoma Constitution is one of the ten state constitutions which does not even mention "conscience" in the religion proviso.

Utah, however, does. Article I, Section I, *Utah State Constitution..*

Madison's efforts to put a right of conscience in the Bill of Rights failed. Antieu, *Freedom from Federal Establishment,* 128-131 (1964); Note 16 Stan. L. R. 494, 495 (1965), footnote 5.

VI

MONUMENTS REFLECT THE CULTURE AND THE COMMONPLACE OF COMMUNITIES.

Theres are no limits on monuments, and the like, outside of public sentiment or a standard of good taste. Grounded in history and heritage, monuments are part of the community and community life. Recognition is not religion *qua* religion, or religion *per se;* decoration is not indoctrination. *In re Opinion of the Justices,* 9 N.E. 2d 753 (Mass 1937); *Attorney General v. Williams,* 174 Mass. 476, 55 N.E. 77, 78 (1889).

The wisdom of Mr. Justice Jackson in *McCollum v. Board of Education* (1948), is applicable here. At 333 U S 233-237, he observed:

> " * * * it may be doubted whether the Constitution, which, of course, protects the right to dissent, can be construed always to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress."
>
> " * * * The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity, both Catholic and Protestant and other faiths accepted by a large part of the world's peoples."

> "Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that no matter what practice prevails, there will be many discontented and possibly belligerent minorities."

VII

THE CASES WHICH CREATE FICTITIOUS RELIGIOUS PROBLEMS IN THE LONG RUN MAY DO GRIEVOUS OR MASSIVE DAMAGE TO THE GENERAL IMAGE OF TRUE RELIGION.

The great mischief inherent was wisely noted a hundred years ago in *Queen v. Bishop of London,* 24 W. B. Div 213 (1874):

> " * * * such litigation becomes more mischievous, the longer it is continued, while the results from it are of exceeding little value * * * "

Examples of such litigation have been frequent the last dozen years.[2] Tolerance and toleration, rather than litigation, should be our state and national theme. To paraphrase Madison: we must beware lest the tiny trickle of one unfinished case swell into a raging torrent of absolute secularism. The American Jewish Congress author of "Religion-Blind Government," 15 Stan L R 389 (1963), defines its sweep at page 404:

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2 See **O'Hair v. Payne,** supra; **Protestants United etc v. O'Brien,** 272 F Supp 712. (U S D C, 1967), **Baer v. Kolmorgen,** 181 NYS 2d 230 (1958), **Lawrence v. Buckmueller,** 243 NYS 2d 87 (1963), **Lewis v. Allen,** 207 NYS 2d 862 (1964), **Brown v. Heller,** 273 NYS 2d 713 (1966).

"Outlawed, too, would be all references to God in oaths of office, state constitutions, presidential resolutions, the pledge of allegiance, the national motto, currency and postage stamps, etc. I have long felt that these were inconsistent with the spirit of the Constitution and the first amendment and with the decisions of the Supreme Court, but I am notoriously 'absolutist' and 'doctrinaire' ".[3]

CONCLUSION

The briefs submitted by the two respondents herein, and by that of the Amicus Curiae, abound with authority to the effect that there is no conflict of decisions herein. Further, that the questions raised by the petitioners are not as important as claimed by them.

The Circuit Court decision, which reversed that of the District Court, is one wherein the decision turns on its own facts, as Judge Murrah so ably set forth in his opinion from the Circuit Court. The outcome will probably affect few others than these petitioner litigants, who ostensibly represent some non-religious sect or group. Hopefully, the authorities cited by the respondents and the Amicus Curiae will convince the court that the decision below was the correct one and that the petition for a Writ of Certiorari should be denied.

Mr. Justice Tobriner expressed the theme (and it could relate to this monument case) all so very well in *People v. Woody*, 394 P 2d 813, 817 (Cal., 1964):

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3 To which Mr. Justice Jackson's words in **Douglas v. City of Jeanette**, 319 U S 157, 179 (1943) are a fitting reply:
"I do not think it any more intended to leave the conscience of a minority to fix its [society's] limits. Civil government cannot let any group ride rough shod over others simply because their 'consciences' tell them to do so."

"In a mass society, which presses at every point toward conformity, the protection of a self-expression, however, unique, of the individual and the group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty."

Respectfully submitted,

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